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No. 82-195

IN THE

Supreme Court of the United States

October Term 1982

VAN D. MUELLER and JUNE NOYES,

Petitioners,

-vs-

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DEHAAN, and DOROTHY DEHAAN,

Respondents.

On Writ Of Certiorari To
The United States Court Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF CITIZENS FOR EDUCATIONAL FREEDOM, AMICUS CURIAE, IN SUPPORT OF THE RESPONDENTS

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MOTION OF CITIZENS FOR EDUCATIONAL FREEDOM FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Citizens for Educational Freedom respectfully moves the Court for leave to file the accompanying brief amicus curiae in support of the respondents. Written consent of counsel for the parties has been requested but not yet received.

Citizens for Educational Freedom ("CEF") is a national organization dedicated to preserving the educational rights of parents and children. It is firmly committed to the belief that education of children is primarily a matter of family and personal concern. Throughout its history, CEF has worked through the legislative and judicial processes and through public information programs to further this belief by supporting and advocating freedom of educational choice for all parents, diversity in education, and, above all, quality education for all children.

Consistent with its commitment to parents and children, CEF represents individuals – citizens, taxpayers, and voters – rather than institutions. Its membership is comprised not of schools, nor of education or other organizations, but of persons from all walks of life and all states of the Union. CEF's members include parents of public schoolchildren, private nonsectarian schoolchildren, and church-related schoolchildren of all denominations. As reflected by this diverse membership, CEF is not dedicated to any one religious belief, nor to religion over nonreligion. It is a pluralistic organization dedicated to quality education in all schools, public, private, and sectarian alike.

One of the goals of CEF has been to secure legislative recognition of the prime role of parents in the education of their children through enactment of education expense income tax deductions for all parents. CEF has advocated such programs

in legislatures throughout the nation. It has supported such programs in the past and intends to support them in the future.

The Minnesota statute now before the Court is one example of the type of legislation which CEF advocates. As such, CEF's policies and goals will unquestionably be affected by the outcome of this litigation. By virtue of CEF's national interests and efforts, CEF does not believe that its interests and policies will be articulated or defended by the parties in this case.

CEF recognizes that the constitutionality of state legislation intended to promote quality education for all children, including those in church-related schools, is one of the most difficult and sensitive areas of constitutional jurisprudence. It is CEF's belief that such questions can be resolved only through a carefully reasoned analysis of the principles set forth in this Court's Establishment Clause decisions, and then application of those principles to the facts of the case at hand. CEF seeks leave to submit the attached brief amicus curiae in order to present its interpretation and analysis of these overriding constitutional principles, and thereby to defend its interest in and commitment to legislation which furthers quality education for all children.

Respectfully submitted,

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BRIEF OF CITIZENS FOR EDUCATIONAL FREEDOM AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The interest of Citizens for Educational Freedom, as amicus curiae in this matter, is set forth in the Motion for Leave to File a Brief Amicus Curiae.

SUMMARY OF ARGUMENT

1. In past cases the "effect" element of the three-part purpose-effect-entanglement Establishment Clause test has presented the major constitutional impediment to state income tax legislation designed to provide educational relief. That element is not an "any effect" standard, however, but is concerned with "primary" effect. As Justice Powell made clear in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), three factors have traditionally been indicative of primary effect: (1) whether the benefits are disbursed to individuals rather than institutions, (2) whether the benefits, either by their nature or through the manner of their provision, reflect a sufficient "guarantee of separation," and (3) whether the benefits are made available to a broad class of beneficiaries.

2. Disbursement to individuals rather than institutions strongly favors a finding of permissible primary secular effect, since the effect test is principally an institutional test, concerned with the impact of government programs on religious institutions, not persons.

3. A genuine tax deduction embodies a sufficient "guarantee of separation," since it is a form of government abstention rather than active government involvement with religious interests. Although the resulting separation may not be absolute and total, such absolute separation has never been required.

4. Availability of benefits to a broad class of persons, such as all parents whose children attend school, regardless of the public-nonpublic or sectarian-nonsectarian nature of the school, is a significant indicator of permissible primary secular effect, since such broadly drawn legislation does not involve a danger of symbolic identification of government with religious interests.

5. The Minnesota education expense tax deduction statute reflects each of the factors which are indicative of permissible primary secular effect. Its benefits go to individuals rather than institutions; it is a genuine tax deduction, not a government subsidy; it is broadly drawn legislation with benefits available to all similarly situated persons, without regard to religious or nonreligious attributes. Such a statute should be found constitutional.

ARGUMENT

I. INTRODUCTION: THE OVERRIDING IMPORTANCE OF QUALITY EDUCATION OF CHILDREN

> *The State has ... a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.*
>
> [Justice Powell in *Wolman v. Walter*, 433 U.S. 229, 262 (1977) (separate opinion) (emphasis added).]

Justice Powell's comments ring particularly true in the case now before the Court. The State of Minnesota has sought to facilitate "education of the highest quality" for all its children, "whatever school their parents have chosen for them," by permitting parents to take state income tax deductions for certain expenses incurred in connection with the education of their children. It can hardly be doubted that the State's interest in

this matter is of the highest order.[1] A well educated young citizenry is perhaps the greatest asset a State can have;[2] it ensures that the leaders of tomorrow will be *informed* leaders; it establishes the basis for *meaningful* free thought, speech, and discourse in ideas. Our system of democratic government is founded on the concept of citizen participation in government. Without educated and informed citizens capable of grasping and resolving the complex issues which confront government at all levels, the necessary citizen participation would be largely meaningless at best, lacking altogether at worst. Education of youth is the prime vehicle for transmission of our culture, our heritage, and our social values. As Justice Powell noted in *Wolman*, the *quality* of that education, not whether it comes from a public, private, or church-related school, is the important point.

Legislatures across the Nation have responded in a variety of ways to the need to preserve quality in education. One such response, typified by the Minnesota legislation at issue in this case, has been state income tax deductions for educational expenses. Opponents of these programs argue, however, that this Court's decision in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), compels the conclusion that all such programs are constitutionally forbidden. Petitioners in this case claim that Minnesota's tax deduction program is indistinguishable from the New York legislation struck down in *Nyquist*. What the opponents fail to recognize is that *Nyquist* was merely one chapter in a continuing constitutional saga. *Nyquist* expressly left open many of the questions that are raised by legislation such as Minnesota's. The purpose of this brief is to demonstrate

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[1] Compare *Wolman*, 433 U.S. at 240: "There is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education." *See also Board of Education v. Allen*, 392 U.S. 236, 247 (1968).

[2] From the opposite perspective, an uneducated and illiterate citizenry is perhaps the greatest liability with which a State can be burdened. Overcrowded prisons and mental institutions and burgeoning welfare and unemployment rolls bear grim witness to the need for all that can be done to improve the social awareness and sense of responsibility of all Americans.

that *Nyquist* is not nearly so forbidding as the opponents wish to believe, but, by virtue of its reasoned analysis of the issues, actually illustrates the factors which a statute must reflect to be found constitutional.

II. THE "EFFECT" ELEMENT OF THE THREE-PART ESTABLISHMENT CLAUSE TEST IS A "PRIMARY EFFECT," NOT AN "ANY EFFECT" STANDARD, AND IS SATISFIED WHERE (1) BENEFITS ARE DISBURSED TO INDIVIDUALS RATHER THAN INSTITUTIONS, (2) THE BENEFITS CONTAIN A SUFFICIENT GUARANTEE OF SEPARATION, AND (3) THE BENEFITS ARE AVAILABLE TO A BROAD CLASS OF PERSONS

A. The Purpose-Effect-Entanglement Test

Justice Harlan once remarked that "it is far easier to agree on the purpose that underlies the ... Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application." *Walz v. Tax Commission*, 397 U.S. 664, 694 (1970) (Harlan, J., concurring). His observation is perhaps most accurate with respect to the validity under the Establishment Clause of state educational relief programs which partly benefit nonpublic education. As Chief Justice Burger noted in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), "[c]andor compels acknowledgement ... that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."

Rather than precise "lines of demarcation," what has emerged is a set of three generalized criteria, or, as Justice Powell put it in *Hunt v. McNair*, 413 U.S. 734, 741 (1973), three "helpful signposts." In *Lemon* itself, the Chief Justice set forth what has since become the classic formulation of these factors:

> First, the statute must have a *secular legislative purpose;* second, *its principal or primary effect must be one that neither advances nor inhibits religion* ...; finally, the statute must not foster an *excessive government entanglement* with religion.
>
> [403 U.S. at 612-13 (emphasis added).]

B. Effect, Nyquist, and Educational Relief Tax Legislation

In past cases, the *Lemon* "effect" criterion has proven to be the major obstacle for state income tax legislation intended to provide educational relief. At issue in *Nyquist*, for example, was a New York tax "reduction" program whereby parents whose adjusted gross income was greater than $5,000 but less than $25,000 could reduce their income by a specified amount for each child for whom the parents paid tuition to a nonpublic elementary or secondary school.[3] The Court held that the tax

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[3]The challenged legislation also involved two other, related programs. First, qualifying nonpublic elementary and secondary schools could receive "maintenance and repair" grants from the State to cover up to 50% of the per pupil costs of school maintenance. Second, parents who had taxable income of less than $5,000 per year could receive nonpublic school tuition "reimbursement" grants of up to $100 per child (but not to exceed 50% of the tuition actually paid). The tuition tax reduction program was designed to pick up where the reimbursement grants left off. However, unlike the reimbursement grants, the tax reductions were entirely unrelated to the amount spent by the parents on tuition. *Nyquist*, 413 U.S. at 789. The amount of the reduction instead was set by the statute and depended exclusively on the parents' adjusted gross income tax bracket. Whatever the amount of the reduction, it was calculated to result in a guaranteed net tax benefit to the parents. For example, a parent whose adjusted gross income was less than $9,000 per year could claim a $1,000 reduction for each child for whom nonpublic school tuition was paid, regardless of whether the amount of tuition actually paid was $50 or $5,000. 413 U.S. at 765-66 & nn. 18-19. Such a reduction was designed to yield a guaranteed net tax benefit to the parents of $50 per child, again regardless of the amount of tuition paid. 413 U.S. at 766. Because of these effects, there was considerable difficulty in characterizing the reductions. According to Justice Powell: "Because of the *peculiar nature* of the benefit allowed, it is difficult to adopt any single traditional label .... It is, at least in its form, a tax deduction .... Its effect ... is more like that of a tax credit since *the deduction is not related to the amount actually spent* for tuition and is apparently designed to yield *a predetermined amount of tax 'forgiveness'* ...." 413 U.S. at 789 (emphasis added). In the end, Justice Powell described the New York tax reductions as "*hybrid* benefits" and "*tax reductions*," 413 U.S. at 789 & 794, (emphasis added), and specifically stated that they were *not* "genuine tax deductions." 413 U.S. at 790 n. 49.

reduction program could not pass muster under the Establishment Clause since its "impermissible *effect*" was to advance "the sectarian activities of religious schools." *Nyquist*, 413 U.S. at 794 (emphasis added).[4] In the post-*Nyquist* cases in which education expense tax legislation has been ruled unconstitutional, each court relied extensively if not exclusively on the *Nyquist* formulation of "secular effect." *See, e.g., Public Funds for Public Schools v. Byrne*, 590 F.2d 514 (3d Cir.), *aff'd mem.*, 442 U.S. 907 (1979); *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 850 (1st Cir. 1980); *Minnesota Civil Liberties Union v. Minnesota*, 224 N.W.2d 344 (Minn. 1974).

C. Primary Effect, Not Any Effect, Is The Proper Test

The "effect" standard set forth in *Lemon* and applied in *Nyquist* clearly is not an "any effect" test. Although such an extreme reading of *Nyquist* has been adopted by at least one court,[5] the author of *Nyquist*, Justice Powell, has unequivocally dismissed such a contention on numerous occasions.[6] In *Hunt v. McNair*, 413 U.S. 734 (1973), for example, he stated:

> [T]he proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected ....

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[4] The Court in *Nyquist* had little difficulty in finding that tax legislation designed to provide educational relief, such as New York's tuition tax reductions (and the Minnesota statute at issue here), has a valid "secular purpose." According to Justice Powell: "[W]e do not doubt – indeed, *we fully recognize – the validity of the State's interests in promoting pluralism and diversity* among its public and nonpublic schools. Nor do we hesitate to acknowledge the reality of its concern for an already overburdened public school system that might suffer in the event that a significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public schools." 413 U.S. at 773 (emphasis added). Compare the Eighth Circuit's comments regarding the purpose of Minnesota's education expense tax deduction statute: "The manifest purpose of the challenged statute is to provide *all* taxpayers a benefit which will operate to enhance the *quality* of education in both public and private schools." *Mueller v. Allen*, 676 F.2d 1195, 1198 (8th Cir. 1982) (emphasis added).

Stated another way, the *Court has not accepted the recurrent argument that all aid is forbidden because aid to*

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[5]In *Minnesota Civil Liberties Union v. Minnesota*, 224 N.W.2d 344 (Minn. 1974), the Minnesota Supreme Court felt compelled by *Nyquist* to reverse the trial court's decision upholding a tuition tax credit statute. The Minnesota court first noted that "absent subsequent decisions of the [United States] Supreme Court," the trial court's finding that the legislation had a permissible secular effect was "fully justified under the standards established ... in *Tilton v. Richardson.*" 224 N.W.2d at 349. According to the Minnesota court, however, the intervening decision in *Nyquist* "effectively changed the course of establishment questions .... In applying the 'primary effects test,' we must be guided by the realization ... that *this is no longer a primary effects test, but an 'any effects' test.* 224 N.W.2d at 350, 353 (emphasis added).

[6]In his separate opinion in *Wolman*, 433 U.S. at 262 (emphasis added), Justice Powell wrote: "No doubt we could achieve greater analytical tidiness if we were to accept the broadest implications of ... *Meek v. Pittenger* .... If we took that course, it would become impossible to sustain state aid of any kind – even if the aid is wholly secular in character and is supplied to the pupils rather than the institutions .... The persistent desire of a number of States to find proper means of helping sectarian education to survive would be doomed. *This Court has not yet thought that such a harsh result is required by the Establishment Clause. Certainly few would consider it in the public interest.*" In *Roemer v. Board of Public Works*, 426 U.S. 736 (1976), Justice Blackmun, joined by Chief Justice Burger and Justice Powell, noted that an "any effect" test would effectively discriminate *against* religious interests: "A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal Governments ... impart certain benefits to virtually all our activities, and religious activity is not an exception. ... [R]eligious institutions need not be quarantined from public benefits that are neutrally available to all .... The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. *If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way.*" 426 U.S. at 745-47 (emphasis added). *See also* Justice Powell's recent opinion in *Widmar v. Vincent*, 454 U.S. 263, 70 L.Ed. 2d 440, 450-51 & n. 15 (1981).

> *one aspect of an institution frees it to spend its other resources on religious ends.*
>
> [413 U.S. at 742-43 (emphasis added).]

Rather than "any" effect, what the Court has consistently been concerned with is the *"primary"* effect of challenged legislation. Merely because a law "make[s] it more likely that some children choose to attend a sectarian school ... does not alone demonstrate an unconstitutional degree of support for a religious institution." *Board of Education v. Allen*, 392 U.S. 236, 244 (1968). Such an effect is not an unconstitutional effect. As Chief Justice Burger explained in *Tilton v. Richardson*, 403 U.S. 672 (1971):

> The *crucial question* is not whether some benefit accrues to a religious institution as a consequence of the legislative program, *but whether its principal or primary effect advances religion.*
>
> [403 U.S. at 679 (emphasis added.)][7]

D. The Traditional Indicia Of Primary Effect

Whether challenged legislation has a permissible primary secular effect or an impermissible primary religious effect is an

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[7]*See also Everson v. Board of Education*, 330 U.S. 1, 17-18 (1947). In *Walz v. Tax Commission*, 397 U.S. 664 (1970), Chief Justice Burger summarized the teaching of *Everson* and *Allen* as to "primary" effect when he wrote that "[i]n *Everson* the Court declined to construe the Religion Clauses with a lateralness that would undermine the ultimate constitutional objective as illuminated by history. Surely, bus transportation ... to pupils who receive religious instruction aid[s] that particular religion to maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age .... Similarly [in *Allen*], making textbooks available to pupils in parochial schools in common with public schools was surely an aid to the sponsoring churches because it relieved those churches of an enormous aggregate cost for those books .... *[But such aid] was not seen ... as having a primary effect of aid contravening the First Amendment.*" *Walz*, 397 U.S. at 671-72 (emphasis added).

admittedly difficult inquiry. Yet, the *Nyquist* decision itself illustrates the contours of this "crucial question." In scrutinizing the New York legislation challenged in *Nyquist*, Justice Powell examined the three factors which traditionally have been determinative of the "effect" question: first, whether the benefits of the program are disbursed to individuals rather than institutions; second, whether the benefits either have no inherent religious significance or are sufficiently "restricted" to ensure that their religious significance is merely incidental; and finally, whether the benefits are available to a broad class of beneficiaries, without regard to religious or nonreligious attributes. Although the New York programs at issue in *Nyquist* failed to qualify under these factors, the *Nyquist* decision highlights what is necessary: the "effect" standard is met if educational benefits are made available to a broad class of individuals (rather than institutions) and if any possible sectarian effect of the benefits is sufficiently indirect, incidental, and restricted.

E. Disbursement To Individuals Rather Than Institutions Favors A Finding Of Primary Secular Effect

Judging from the notable absence in petitioners' brief of any meaningful reference to the distinction between aid to individuals and aid to institutions, petitioners apparently believe and would have the Court hold that it is a distinction without a difference. Indeed, what is implicit in petitioners' silence on this point is made explicit by their amici:

> The dichotomy between pupil (or parent of pupil) benefit and benefit to the schools seems to be "a chimerical constitutional criterion."
>
> *[Amicus Brief of the Nat'l School Boards Ass'n* at 25, *quoting* Freund, *Public Aid to Parochial Schools*, 82 *Harv. L. Rev.* 1980 (1969).]

With all due respect to petitioners, amicus, and Professor Freund, such a comment betrays a fundamental misunderstanding of this Court's Establishment Clause decisions. Far from being "chimerical," the distinction between benefits to individuals and benefits to institutions is of overriding constitutional sig-

nificance; it reflects a basic distinction between what the "effect" test is concerned with and what it is not. That test is an "institutional" test. As Justice Powell explained in *Nyquist*, it is designed to scrutinize "effect[s] advantageous to religious *institutions*," not individuals. *Nyquist*, 413 U.S. at 783 n. 39 (emphasis added). *See also Wolman*, 433 U.S. at 263 (Powell, J.) (separate opinion). Time and again this Court has reaffirmed the teaching of *Everson v. Board of Education*, 330 U.S. 1 (1947), and *Board of Education v. Allen*, 392 U.S. 236 (1968), that state aid to individuals stands on an entirely different constitutional footing from aid to institutions.[8] In *Lemon v. Kurtzman*, Chief Justice Burger aptly summarized this principle when he stated:

> The ... statute [at issue in *Lemon*] ... has the ... defect of providing state financial aid *directly* to the church-related school. This factor distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out *that state aid was provided to the student and his parents -- not to the church-related school.*
>
> [403 U.S. at 621 (emphasis added).]

This is not to say that disbursement to individuals necessarily satisfies the "effect" standard.[9] As Justice Powell explained in *Nyquist*, the fact that aid is disbursed to individuals rather than institutions does not create an irrebuttable presumption of

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[8]For example, in *Allen* Justice White wrote that *"no funds or books are furnished to parochial schools and the financial benefit is to parents and children, not to schools."* 392 U.S. at 243-44 (emphasis added). Similarly, in *Everson* Justice Black stated that the *"State contributes no money to the schools. It does not support them.* Its legislation ... does no more than provide a general program *to help parents* get their children, regardless of their religion, safely and expeditiously to and from ... schools." *Everson*, 330 U.S. at 17-18 (emphasis added).

[9]This is also not to say that aid directly to institutions necessarily violates the "effect" standard. *See, e.g., Committee for Public Education v. Regan*, 444 U.S. 646 (1980).

validity but is one significant factor to be considered. *Nyquist*, 413 U.S. at 781.[10] In light of cases such as *Everson* and *Allen*, it is a highly significant factor. Justice Powell himself pointed this out in his separate opinion in *Wolman*, when he noted that individualized "instructional materials," incapable of diversion to religious uses, can be provided by the State *"so long as the materials are lent to the individual students or their parents and not to the sectarian institutions."* *Wolman*, 433 U.S. at 263 (emphasis added). In making these comments, Justice Powell was explicitly distinguishing *Meek v. Pittenger*, 421 U.S. 349 (1975), where the Court held that similar loans of instructional materials directly to schools were impermissible.[11]

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[10]At least three Justices – Chief Justice Burger, Justice White (the author of *Allen*), and Justice Rehnquist – would seem to rule that disbursement to individuals rather than institutions renders a program per se constitutional. According to the Chief Justice: "[T]he Establishment Clause does not forbid ... a program of general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that 'aid' religious instruction or worship ... [A]id to individuals generally stands on an entirely different footing from direct aid to religious institutions." *Nyquist*, 413 U.S. at 799-801 (Burger, C.J., dissenting). Similarly, Justice Rehnquist has stated that "the impact, if any, on religious education ... is significantly diminished by the fact that the benefits go to the parents rather than to the institutions." *Nyquist*, 413 U.S. at 812-13 (Rehnquist, J., dissenting).

[11]Justice Powell's separate opinion in *Wolman* also points out a second significant aspect of the "child benefit" doctrine of *Allen* and *Everson* – where aid is disbursed to children rather than schools, there is no concern with whether the schools are "pervasively sectarian." In *Meek* the Court employed this concept of "pervasive sectarianism" to invalidate loans made *directly* to church-related schools, on the ground that "[s]ubstantial aid to the educational function of ...[pervasively sectarian] schools ... necessarily results in aid to the ... religious mission" as well, since the secular and religious functions are "inextricably intertwined." *Meek*, 421 U.S. at 366. As Justice Powell's *Wolman* opinion makes clear, loans to students, not schools, are permissible under *Allen, even though the schools attended by the students are "pervasively sectarian."*

The challenged Minnesota education expense tax deduction statute unquestionably confers its benefits upon individuals rather than institutions. As *Allen*, *Everson*, and Justice Powell's opinion in *Wolman* make clear, such a fact favors a finding of "primary secular effect" and constitutionality.

F. A "Genuine Tax Deduction" Portrays Government Abstention Rather Than Active Involvement And Thus Reflects A Sufficient Guarantee Of Separation Between The State And Religious Interests

1. The "Guarantee Of Separation" Requirement

To the extent that disbursement to individuals (rather than institutions) does not conclusively establish a permissible primary secular effect, the Court's application of the "effect" standard has also looked to whether the relevant benefit, either by its very nature or through the manner of its provision, contains a sufficient "guarantee ... [of] separation between secular and religious educational functions ... to ensure that State financial aid supports only the former." *Nyquist*, 413 U.S. at 783, *quoting Lemon*, 403 U.S. at 613. As Justice Powell explained in *Nyquist*, the programs in *Everson* (school transportation) and *Allen* (textbook loans) were found to have a primary secular effect not only because the aid went to children or their parents rather than schools, but also because the aid either had "no inherent religious significance" or was sufficiently restricted so that its potential sectarian impact was minimized. *Nyquist*, 413 U.S. at 782. As such, the programs in *Everson* and *Allen* embodied the necessary "guarantee of separation" and thus could "fairly be viewed as reflections of a neutral posture toward religious institutions." *Nyquist*, 413 U.S. at 782.

2. Absolute Separation Has Never Been Required

Consistent with the principle that "primary" effect, not "any" effect, is the proper test, the Court has never required that this "guarantee of separation" be an absolute guarantee; it has never scrutinized educational aid legislation for total separation between secular and sectarian effects. "[A] hermetic separation of the two is an impossibility ... [that] has never [been] required." *Roemer v. Board of Public Works*, 426 U.S. 736, 746 (1976) (Blackmun, J., joined by Burger, C.J., and

Powell, J.).[12] As Chief Justice Burger recognized in *Lemon v. Kurtzman*:

> Our prior holdings do not call for total separation between church and state; *total separation is not possible in an absolute sense* ... [T]he line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.
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> [403 U.S. at 614 (emphasis added).]

The contrasts between *Everson*, *Allen*, and *Nyquist* are instructive on what constitutes a sufficient, although perhaps not an absolute, "guarantee of separation." In *Everson* the Court characterized the challenged school transportation bus fare program as comparable to such general welfare benefits as police and fire protection, and held that even though "[i]t is undoubtedly true that children are helped to get to church schools," such benefits nevertheless are "separate and ... indisputably marked off from the religious function" of church-related schools and thus ensure neutrality. *Everson*, 330 U.S. at 17-18. As Justice White put it in *Allen*, the *Everson* bus rides had "no inherent religious significance." *Allen*, 392 U.S. at 244.

Unlike the bus rides in *Everson*, the textbook loans in *Allen* could not be construed as lacking "inherent religious significance." Textbooks have content, and that content could conceivably be sectarian. Nevertheless, the loan program was approved because the possible religious significance of the textbooks was offset by restrictions in the program itself – only secular textbooks could be loaned. *Allen*, 392 U.S. at 244-45.

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[12]Compare Justice Powell's separate opinion in *Wolman*, 433 U.S. at 263 (emphasis added): "Our decisions have sought to establish principles that preserve the cherished safeguard of the Establishment Clause *without resort to blind absolutism.*" *See also Committee for Public Education v. Regan*, 444 U.S. 646, 662 (1980): "Our decisions have tended to avoid categorical imperative and absolutist approaches at either end of the range of possible outcomes."

The tuition tax reductions challenged in *Nyquist*, although provided to parents rather than schools, stand in marked contrast to the programs approved in *Everson* and *Allen*. Unlike *Everson's* bus rides and *Allen's* textbook loans, the *Nyquist* program embodied no guarantee that its potential sectarian effect would be minimal or incidental. Just the opposite, New York's tuition tax reductions were an entirely *"arbitrary amount"* designed to "yield a *predetermined* amount of tax forgiveness." *Nyquist*, 413 U.S. at 789 (emphasis added). *See* note 3 *supra*. They bore no relation whatsoever "to the amount of money actually expended by any parent on tuition." 413 U.S. at 790. Far from containing a guarantee of separation, the *Nyquist* tax reductions were capable of resulting in a net, predetermined, and *guaranteed* monetary benefit that could equal or *even exceed* the amount spent on tuition. In light of these characteristics, Justice Powell had little difficulty in finding that New York's tax reductions were not part of a bona fide tax program but were mere subsidies crafted to serve as "encouragement and reward" and an "incentive to parents to send their children to sectarian schools." 413 U.S. at 786, 791. Such an "incentive" is a far cry from the necessary "guarantee of separation."

3. Nyquist, Walz, And Genuine Tax Deductions: Abstention Versus Involvement

In reaching the foregoing conclusion, Justice Powell was careful to point out that New York's arbitrary tax reductions were not "genuine tax deductions" and that the Court's decision should not be construed as implicating the latter. He wrote:

> Since the [tax reduction] program here does not have the elements of a *genuine tax deduction*, such as for charitable contributions, we do not have before us, and do not decide, whether that form of tax benefit is constitutionally acceptable under the "neutrality" test in *Walz* [*v. Tax Commission*, 397 U.S. 664 (1970).]
>
> [*Nyquist*, 413 U.S. at 790 n. 49 (emphasis added).]

There was good reason to distinguish genuine tax deductions. According to the factors specified in *Walz*, a genuine tax deduction contains the requisite "guarantee of separation" and thus

comes within the realm of permissible effects defined by cases such as *Everson* and *Allen*.

In *Walz* Chief Justice Burger contrasted direct government subsidies of religious activity with exemption from taxation of the same activity, and held that whereas the former can pose serious Establishment Clause concerns, the latter reflects only government abstention and thus stands on an entirely different constitutional footing. Such abstention is fully consistent with the separation requirement. As Justice Frankfurter explained, "[s]eparation is a requirement *to abstain* from fusing functions of Government and of religious sects." *McCollum v. Board of Education*, 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring) (emphasis added). Similarly, in *Walz* Chief Justice Burger reasoned that without affirmative government action towards religious interests, there is nothing to trigger the traditional Establishment Clause concerns of "sponsorship, financial support and *active* involvement of the sovereign in religious activity." 397 U.S. at 668 (emphasis added). According to the Chief Justice:

> Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them .... Obviously *a direct money subsidy would be a relationship pregnant with involvement*, ... but that is not this case .... *The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches* but simply *abstains* from demanding that the church support the state .... *There is no genuine nexus between tax exemption and establishment of religion.*
>
> [*Walz*, 397 U.S. at 674-75 (emphasis added).]

As Justice Powell intimated in *Nyquist* footnote 49, the analysis in *Walz* serves to distinguish genuine tax exemptions and deductions, on the one hand, from New York's hybrid tax reductions, on the other. As pointed out earlier, New York's arbitrary tax reductions were not part of a bona fide tax program but were mere incentives and rewards, a form of subsidization.

They reflected active government involvement with religious interests and thus fell on the impermissible side of the subsidy/abstention distinction drawn by Chief Justice Burger in *Walz*. By contrast, genuine tax exemptions and deductions fall on the valid side of that distinction; both are a form of government abstention from taxation rather than affirmative government involvement with religious interests.[13] Although, as the Chief Justice pointed out in *Walz*, there is no clear-cut point at which a tax program crosses over from permissible primary secular effects to impermissible primary sectarian ones,[14] the fact of government abstention rather than active involvement ensures that the religious effects will be attenuated, indirect, and only incidental. As *Walz* holds, such incidental benefits reflect a sufficient guarantee of separation and hence are valid under the Establishment Clause.

The foregoing discussion highlights the significant differences between New York's hybrid tax reductions and Minnesota's genuine tax deductions. Whereas the former were effectively nothing more than subsidies, Minnesota's education expense deductions involve government abstention and are part of a true tax program, designed not to encourage religious activity, nor to result in any predetermined and guaranteed financial reward, but merely to further quality education for all children without regard to religion. According to *Walz*, any sectarian benefits derived from the Minnesota program will be only incidental benefits. In such a case, the necessary "guarantee of separation" exists and the program portrays a primary secular effect, a conclusion which is irrebuttably bolstered by the last factor indicative of primary effect.

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[13]The fact that *Walz* dealt with tax "exemptions" whereas the instant case involves tax "deductions" is not constitutionally significant. In *Nyquist*, Justice Powell noted that "constitutionality ... does not turn in any event on the label ...." 413 U.S. at 789. The important point is the "substance" of the program, and here that "substance" is government abstention from taxation and a genuine tax program.

[14]In *Walz* Chief Justice Burger stated that "[t]he test is inescapably one of degree .... Separation in this context cannot mean absence of all contact." 397 U.S. at 674, 676.

G. Availability Of Benefits To A Broad Class Of Persons Ensures There Will Be No Symbolic Identification Between Government And Religious Interests

> *[T]he ... benefit is available to a broad class of nonreligious as well as religious ... groups .... The provision of benefits to so broad a spectrum of groups is an important index of secular effect.*
>
> [Justice Powell in *Widmar v. Vincent*, 454 U.S. 263, 70 L.Ed. 2d 440, 450 (1981) (emphasis added).]

Walz rests not only on the fact of government abstention from taxation but also, and perhaps more fundamentally, on the fact that the tax exemptions at issue were available to a broad class of beneficiaries, to "*all* houses of religious worship within *a broad class* of property owned by nonprofit, quasi-public corporations ...." *Walz*, 397 U.S. at 673 (emphasis added). *Everson* and *Allen* are to the same effect; in each case the educational benefits were available not merely to nonpublic school children but to *all* school children, regardless of whether they attended a public or a nonpublic school. By contrast, the New York legislation challenged in *Nyquist* was narrowly drawn, affording benefits *only* to nonpublic school children and their parents. Justice Powell stressed this very fact when he distinguished *Nyquist* from *Everson* and *Allen*. As Justice Powell explained:

> *Allen* and *Everson* differ from the present litigation in a second important respect. In both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools.
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> [*Nyquist*, 413 U.S. at 783 n. 38 (emphasis in original).] [15]

The Minnesota legislation before the Court unquestionably reaches a broad class of beneficiaries. Indeed, *it could not be*

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[15] *See L. Tribe, American Constitutional Law* 845 (1978) (emphasis added): "The *narrowness* of the benefited class was *a key factor* in ... *Nyquist*."

any broader–education expense tax deductions are made available to *all* parents who incur the specified costs, regardless of whether their children attend public, nonpublic and nonsectarian, or church-related schools. According to cases such as *Walz*, *Allen*, and *Everson*, and according to Justice Powell's statements in *Nyquist* and *Widmar*, this breadth militates strongly in favor of the constitutionality of the Minnesota statute.

The statute's obvious breadth has not dissuaded petitioners. In the trial court and again in the Court of Appeals, and yet again in this Court, they have sought to undercut the importance of the statute's breadth by pointing to cleverly devised statistical calculations which supposedly show that Minnesota's tax deductions are taken primarily by parents whose children attend church-related schools. Petitioners' reliance on such statistical data is misplaced for at least two reasons. First, their "statistical argument" is inherently misleading; as trial Judge Renner found, it "lacks credibility by reason of *omissions of serious significance.*" *Mueller v. Allen*, 514 F. Supp. 998, 1003 (D. Minn. 1981) (emphasis added). Second, and even more noteworthy, petitioners' "statistical argument" has missed the point; they have ignored a fundamental distinction, consistently followed by this Court, between narrowly drawn legislation, on the one hand, and broadly drawn legislation, on the other.

The Court has engaged in a statistical examination of the breadth of the benefited class *only* when it has been confronted with *narrowly* drawn legislation under which benefits were limited to nonpublic schools or their students.[16] In cases involving

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[16] In *Nyquist*, for example, Justice Powell examined the relative percentages of sectarian and nonsectarian schools within the legislation's class of beneficiaries, and concluded that the "great majority" of the beneficiaries were either sectarian schools or children attending such schools. 413 U.S. at 768, 783, 794. Petitioners' statistical argument apparently derives from *Nyquist*. Even in *Nyquist*, however, the Court did not employ the type of analysis urged by petitioners. In *Nyquist*, Justice Powell looked to the "intended beneficiaries" of the statute, to who was "entitled to" or eligible for benefits. 413 U.S. at 768. Petitioners, by contrast, would go beyond *Nyquist* and measure breadth in terms of actual recipients.

broadly drawn statutes, such as *Allen*, *Walz*, and *Everson*, the Court has *not* engaged in a statistical breadth analysis but instead has stressed that the legislation, as written, reached all similarly situated persons without regard to their religious or nonreligious attributes.[17] In *Allen*, for example, Justice White wrote that "[t]he law merely makes available to *all* children the

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[17] *Nyquist* itself recognized this distinction. In pointing out that the great majority of the beneficiaries of New York's narrowly drawn tax reduction program were parents with children in church-related schools, Justice Powell was careful to distinguish *Walz*, *Everson*, and *Allen*, and to state: "The exemption challenged in *Walz* was *not restricted* to a class composed exclusively or even predominantly of religious institutions. Instead, the exemption covered *all* property devoted to religious, educational, or charitable purposes. As the parties here must concede, tax reductions ... flow primarily to the parents of children attending sectarian ... schools. Without intimating whether this factor alone might have controlling significance *in another context* ..., it should be apparent that ... *the narrowness of the benefited class would be an important factor.*" 413 U.S. at 794 (emphasis added). Justice Powell cross-referenced this statement to his earlier footnote 38, in which he stated that *Nyquist* differed from *Allen* and *Everson* in that "*all* schoolchildren" were eligible for benefits in the latter cases, and that "public assistance ... made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefited" was not implicated by the *Nyquist* decision. 413 U.S. at 783 n. 38 (emphasis in original). In this regard Justice Powell cited *Wolman v. Essex*, 342 F. Supp. 399, 412-13 (S.D. Ohio), *aff'd.*, 409 U.S. 808 (1972), where the court explained that *Everson*, *Allen*, *Walz*, and *Tilton* approved programs under which "religiously affiliated institutions were among a broad class of beneficiaries deriving benefits of a general, broad-based public policy." *See also Kosydar v. Wolman*, 353 F. Supp. 744, 753 (S.D. Ohio 1972), *aff'd. mem. sub nom. Grit v. Wolman*, 413 U.S. 901 (1973) ("[w]here the affected class of a legislative enactment is a broad and internally pluralistic one, then, as a matter of law, the primary effect of such a statute is not the advancement of religion ..."). *Nyquist* thus drew a clear distinction between statutes which benefit only a narrow class of persons, and which thus should be subject to a statistical scrutiny, and statutes which reach all similarly situated persons, and which traditionally have not been analyzed in terms of a statistical breakdown of beneficiaries.

benefits of a general program ...." 392 U.S. at 243 (emphasis added).

This distinction is not one without a difference. As Professor Tribe has explained, the breadth component and the effect standard as a whole are concerned not so much with actual effects as with public perceptions and "symbolic identification" of government programs with religious interests. *L. Tribe, American Constitutional Law* 839-46 (1978). In the recent decision in *Larkin v. Grendel's Den., Inc.*, ____ U.S. ____, 51 U.S.L.W. 4025, 4028 (1982) (emphasis added), for example, the Court stressed the *"symbolic benefit to religion in the minds of some."* According to Tribe:

> [W]hat turns on the breadth of the benefited class is not dollars -- the amount of aid plainly does not depend on how many others also receive it – *but symbols; the broader the class benefited, the less likely it is that the program will be perceived as aid to religion.*
>
> *[Tribe, supra,* at 845 (emphasis added).]

Narrowly drawn legislation clearly embodies a danger of symbolic identification, since it is far more likely that such a program will be seen as conferring a special benefit on religious interests. The fact that some persons receive a benefit, whereas other similarly situated persons are excluded, tends naturally to foster a perception by those excluded of a special affiliation between the State and the benefited class. For example, if eligibility for education benefits is limited to students at nonpublic schools, as in *Nyquist*, the public's common knowledge that most such schools are sectarian, coupled with the fact that most of the children in the total student population, those in public schools, are statutorily excluded from eligibility, likely will lead to a perception that the benefits flow primarily to sectarian schoolchildren. In such a case it is clearly appropriate to look behind the statute and, through a statistical breadth analysis, ascertain whether the danger of symbolic identification is a real and probable danger.

Broadly drawn legislation presents an entirely different situation. Where all similarly situated persons (such as all parents or

all schoolchildren) are eligible for benefits, as in *Everson*, *Allen*, and *Walz*, there is little likelihood that the program will be perceived as aid to a special group, since there is no special group which receives an eligibility preference. In such a case there is little or no danger of symbolic identification and consequently nothing to trigger the need for a statistical examination of the class of beneficiaries.[18] The important point is that the statute treats all persons equally, such that no one group can be seen as being favored over others.

The concept of symbolic identification ties together and makes sense of the seemingly different modes of breadth analysis used in *Nyquist*, on the one hand, and *Walz*, *Everson*, and *Allen*, on the other. It leads to the constitutionally significant distinction between narrowly drawn versus broadly drawn legislation. The Minnesota statute before the Court falls on the latter side of that distinction. Because its benefits are available to parents of all school children, not merely parents of nonpublic

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[18] The inherent dangers of grounding constitutional adjudication on so slender a reed as statistical analysis suggests that such an analysis should be avoided if at all possible. Statistics are notoriously pliable. Data can be manipulated to appear to support any conceivable position. Undue reliance on statistical calculations will hardly lead to consistent results. If primary effect is made to turn on mere statistics, a statute that is valid one year could well become invalid the next; the same programs upheld in *Walz*, *Allen*, and *Everson* could now be attacked anew and stricken solely because of a numerical change in the breakdown of beneficiaries. It is difficult to believe that constitutional law can thus be reduced to mere mathematics. As the Eighth Circuit aptly stated: "If a pure de facto approach were taken, a statute's constitutionality might turn on local annual statistics. That is, *the same statute might be constitutional one year, and not the next, or in one state and not in another, depending upon the current statistical breakdown of sectarian and nonsectarian schools*." *Mueller v. Allen*, 676 F.2d 1195, 1201 n. 13 (8th Cir. 1982) (emphasis added). *See also Walz*, 397 U.S. at 674. Given these potential pitfalls, the courts should naturally be hesitant to place great reliance on mere statistical calculus, and should not resort to such a method where, as with broadly drawn legislation, it is not necessary.

school children, the Minnesota statute does not present the danger of symbolic identification found in cases such as *Nyquist*. Just the opposite, it is like the statutes in *Allen*, *Walz*, and *Everson*, where the absence of such danger strongly favored a finding of constitutionality.

III. THE MINNESOTA EDUCATION EXPENSE TAX DEDUCTION STATUTE SATISFIES EACH OF THE FACTORS SET FORTH IN NYQUIST WHICH TRADITIONALLY HAVE BEEN INDICATIVE OF A PERMISSIBLE PRIMARY SECULAR EFFECT

Far from being an absolute condemnation of all tax legislation aimed at improving quality education, the *Nyquist* decision is a virtual primer on how such a statute must be drawn to ensure that it has a permissible primary secular effect. In *Nyquist* Justice Powell stressed three factors: aid to individuals rather than institutions, an assurance of separation, and benefits made available to a broad class of beneficiaries. The Minnesota education expense tax deduction statute reflects each of these factors: its benefits go to children and their parents, not schools; it is a genuine tax deduction involving government abstention rather than active government involvement with religious interests, and thus ensures separation and neutrality; its benefits are available to a broad class of parents who incur costs in connection with the education of their children, regardless of the schools they happen to attend. According to *Nyquist* itself, this type of tax legislation cannot be stricken on effect grounds.

CONCLUSION

When all the legal arguments and constitutional complexities are momentarily set aside, then this case is not about religion or nonreligion, nor about establishment or neutrality. What it's about is children, and the quality of education they're going to receive. As far as the children are concerned, whether that education comes from a public, a private, or a church-related school makes no difference at all. What matters is that it is a quality education.

The statute before the Court is one attempt to deal with the ever-growing crisis in education. It reflects a legislative desire to

help children achieve their true and full potential; it is an endeavor to ensure that the children in our schools today will grow to be educated, informed, and responsible adults. Perhaps there is no constitutional "right" to an education, but that hardly means that education of youth is not highly important. It clearly is. As this Court wrote in *Board of Education v. Allen*, 392 U.S. at 247, "Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create." For these reasons, the judgment of the Eighth Circuit should be affirmed.

Respectfully submitted,

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State of Ohio :
: SS:
County of Franklin :

On this 26 day of January 1983, before me, a Notary Public in and for the State of Ohio, County of Franklin, the undersigned, Steven W. Tigges, personally appeared before me and, being first duly sworn, did depose and say that in accordance with Rule 28.3 of the Rules of Practice of the Supreme Court of the United States, he served today, by first class United States mail, postage prepaid, three copies of the motion for Leave to File a Brief Amicus Curiae and the Brief Amicus Curiae of Citizens for Educational Freedom, in Support of the Respondents, upon the following attorneys of record:

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Sworn to before me and subscribed in my presence on the aforesaid date.

Janel Burke
Janel Burke, Notary Public

JANEL BURKE
NOTARY PUBLIC - STATE OF OHIO
MY COMMISSION EXPIRES AUGUST 12, 1984